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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In Re:

CHRISTOPHER MICHAEL MARINO  
and VALERIE MARGARET MARINO

Debtors.

BK-13-50461-BTB  
Chapter 7

Hearing Date: 12/09/20  
Hearing Time: 2:00 p.m.

New Hearing Date: 2/19/2021  
New Hearing Time: 10:00 a.m.

OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT OR  
ORDER (RULE 9024) AND FOR NEW EVIDENTIARY HEARING

COMES NOW, Debtors, CHRISTOPHER MICHAEL MARINO and VALERIE MARGARET MARINO, ("Debtors" or "Mr. and Mrs. Marino"), and files this Opposition to Motion for Relief from Judgment or Order (Rule 9024) and for New Evidentiary Hearing (Dkt. 162) filed by PHH Mortgage Services, ("PHH") formerly known as Ocwen Loan Servicing LLC ("Ocwen").

I

OVERVIEW

In a nutshell, PHH wants a do-over. Astonishingly, almost six (6) years after the Marinos filed their Motion for Contempt, and almost five (5) years after this Court decided against PHH, it wants to relitigate that Motion for Contempt. But nothing requires it, not even the Supreme Court's 2019 *Taggart* decision. At best, even if *Taggart* applied retroactively, and it shouldn't, it would only require the Court to look at the evidentiary hearing facts and its own earlier Opinion to determine if *Taggart* would

1 have changed that earlier decision. Not surprisingly, a simple look at the Court's prior  
2 opinion, the evidence that was admitted, and the *Taggart* decision all reveal that there  
3 isn't any reason for the Court to change its opinion.

## 4 II

### 5 ARGUMENT

#### 6 1. Retroactive relief is not required.

7 To begin with, PHH urges this Court to apply *Taggart v. Lorenzen* 139 S.Ct.1795  
8 (2019) retroactively. But, it need not. In pushing this position, PHH specifically relies  
9 on *Harper v. Virginia Dpt. of Taxation*, 509 U.S. 86 (1993). But, as explained below,  
10 *Harper* doesn't apply in this situation because only it stands for the proposition that,  
11 once a rule of federal law is applied to the parties in the case in which it was announced,  
12 it must be applied retroactively. *Id* at 96.

13 Instead, the seminal case on retroactivity was decided by the United States  
14 Supreme Court in *Chevron Oil* two decades before the *Harper* decision. It held, that in  
15 determining retroactive application of a new holding, the Court is to evaluate the  
16 following: 1) whether the decision announces a new principle of law, either by overruling  
17 clear past precedent or by deciding an issue of first impression the resolution of which  
18 was not clearly foreshadowed; 2) weigh the merits and demerits of the particular case by  
19 looking to the prior history of the rule in question, its purpose, and effect, and consider  
20 whether retrospective operation will further or hinder its operation; and 3) weigh the  
21 inequity imposed by retroactive application, recognizing that injustice or hardship  
22 should be avoided. *Chevron Oil Co. V. Huson*, 404 U.S. 97, 106 (1971). As shown below,  
23 none of these prongs warrant retroactive review of the Court's decision from more than  
24 four years ago.

25 Besides, any position that *Chevron* has been overruled or otherwise abrogated by  
26 *Harper* was explicitly rejected in *McKinney v. Pate*, 20 F.3d 1550, 1566 (11<sup>th</sup> Cir. 1994),  
27 *cert. denied*, 513 U.S. 1110 (1995), which specifically held that *Harper* did not overrule

1 *Chevron*, pointing out, as already mentioned above, that *Harper* only stands “for the  
2 proposition that, once a rule of federal law is applied to the parties in the case in which it  
3 was announced, it must be applied retroactively.” *Id* at 1566. That is all it held. Thus,  
4 PHH should not be allowed to extend *Harper* into new and uncharted territory  
5 without a clear mandate from the U.S. Supreme Court.

6 This is further supported by the language in *Harper* itself (as well as the  
7 certiorari denial of *McKinney*), which itself limits its holding to the parties before it and  
8 provides, “[w]hen this Court applies a rule of federal law to the parties before it, that  
9 rule is the controlling interpretation of federal law and must be given full retroactive  
10 effect in all cases still open on direct review and as to all events, regardless of whether  
11 such events predate or postdate our announcement of the rule.” *Harper*, 509 U.S. at 97.  
12 Thus, a new rule of federal law is only required to be applied retroactively to the parties  
13 of the case in which the new rule was announced. As such, *Chevron* remains controlling  
14 in determining whether *Taggart* should be applied retroactively. See also, *Glazner v.*  
15 *Glazner*, 347 F.3d 1212, 1216 (11<sup>th</sup> Cir. 2003) (citing *Chevron* and recognizing that the  
16 Supreme Court has allowed for prospective-only application of newly announced rules  
17 in civil cases).

18 So in considering the first of the *Chevron* factors, the overruling of clear past  
19 precedent, it is plain that *Taggart* reversed the Ninth Circuit’s *subjective* standard that  
20 had been the law for only one year and was not known by these parties until two years  
21 *after* this litigation began and was decided. Thus, it could not have been relied upon by  
22 PHH in considering its case management. As such, the first *Chevron* factor weights  
23 against retroactive application of *Taggart* to the instant case.

24 The second *Chevron* factor also weighs against retroactive application in that  
25 weighing the merits and demerits of *this case* in light of the contempt rule now  
26 controlling will neither further nor hinder the new *Taggart* standard. This particular  
27 case is premised upon a narrow set of facts and the application or non-application of the  
28

1 contempt standard will have no effect on the applicability of the easier standard in that  
2 there are no other cases directly related to this case that would be impacted or that  
3 remain pending. In fact, the parties in this case, and the Court, were playing by a known  
4 set of rules that were relied upon throughout the litigation of the merits of this case.  
5 Knowing the controlling law at the time, PHH chose to proceed and defend regardless of  
6 the law's status and was well aware that the law would not support its view even under  
7 the Ninth Circuit's old *subjective* standard. Likewise, the Marinos pursued the case  
8 based upon the same case law and gauged their case accordingly. Stated another way, a  
9 prospective only application of *Taggart* in light of this particular case, will neither  
10 further nor hinder the new Supreme Court holding in the grander scheme of its  
11 application.

12 As to the third *Chevron* consideration, without question, denial of retroactive  
13 application of the lower contempt standard would not result in inequity to PHH. Again,  
14 PHH was well aware of the potential exposure it had. On the flip side of the same coin,  
15 the Marinos relied upon the law in place at that time in choosing to pursue their  
16 litigation. Thus, *none* of the *Chevron* prongs are in favor of PHH's request for  
17 retroactive relief.

18 Besides, it would be wholly unjust to the Marinos, and a windfall to PHH, if the  
19 Court were to allow PHH to benefit from a change in the law that occurred years after  
20 this matter was fully litigated and has been pending on appeal for years, because of  
21 PHH. And, that is based upon a contempt standard that is now actually easier than it  
22 was under the prior Ninth Circuit *Taggart* standard. Obviously, the Marinos had no  
23 control over the length of PHH's appeals and should not be damaged beyond what they  
24 have been because of a crowded Ninth Circuit docket and a long appeal wait. That would  
25 plainly be unjust.

26 Finally, PHH should not be permitted to exploit the change of law to support a  
27 request for a new hearing, especially because it specifically knew they were not entitled

1 to one when they pursued their appeals. Besides, this Court has already considered and  
2 rejected PHH's claims that it had acted appropriately.

3 2. FRBP 60 does not give PHH a basis for setting aside the judgment.

4 Next, PHH seeks relief under FRBP 60(b). A motion for relief from a judgment  
5 under Bankruptcy Rule 9024, incorporates Rule 60(b) of the Federal Rules of Civil  
6 Procedure. *United States v. Nutricology, Inc.*, 982 F.2d 394, 397 (9<sup>th</sup> Cir. 1992).

7 However, "reconsideration of a judgment after its entry is an extraordinary remedy  
8 which should be used sparingly," 11 *Charles Alan Wright, Arthur R. Miller & Mary K.*  
9 *Kane, Federal Practice & Procedures: Civil 2D* § 2810.1 (1995). See *School Dist. No. 1J*  
10 *v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9<sup>th</sup> Cir. 1993); 12 *James WM. Moore, et. al., Moore's*  
11 *Federal Practice - Civil* §59.30[5][a][I] (3d ed. 2005).

12 Rule 60 encompasses all possible post-judgment relief and incorporates common  
13 law principles of equity for granting new trials, 11 *Charles Alan Wright, Arthur R. Miller*  
14 *& Mary K. Kane, Federal Practice & Procedures: Civil 2D* § 2810 (1995), and Rule 60  
15 preserves the relief afforded by ancient remedies for relief from settled judgment while  
16 abolishing the separate and independent use of those remedies. *Id* at §2851.

17 As a consequence, Rule 9024, incorporating as it does Rule 60, recognizes the  
18 need "to preserve the delicate balance between the sanctity of final judgments and the  
19 incessant command of a court's conscience that justice be done in light of all the facts."  
20 *In re Kieffer-Miches, Inc.*, 226 B.R. 204, 209 (B.A.P.8th Cir. 1998), quoting *Hoover v.*  
21 *Valley West D M*, 823 F.2d 227, 230 (8<sup>th</sup> Cir. 1987), in turn quoting *Rosebud Sioux*  
22 *Tribe v. A & P Steel, Inc.* 733 F.2d 509, 515 (8<sup>th</sup> Cir. 1984). Due to this broad scope of  
23 potential relief, under both rules "a bankruptcy court has wide latitude to reconsider and  
24 vacate its own prior decisions . . ." *Bialac v. Harsh Inv. Corp. (In re Bialac)*, 694 F.2d  
25 625, 627 (9<sup>th</sup> Cir. 1982). But here, that would not be justified.

1 A) FRBP 60(b) (5) doesn't apply

2 PHH seeks relief under either FRBP 60(b)(5) or FRBP 60(b)(6). But, a look at  
3 both, show *neither* provides a basis to rehear this litigation. First, Rule 60(b)(5) allows  
4 a court to set aside a judgment if it has been satisfied, released, discharged, or based on  
5 an earlier judgment that has been vacated, reversed or no longer equitable. Here,  
6 because none of those occurred, this Rule does not come into play.

7 Knowing this, PHH tries stretching this Rule to include a significant change in the  
8 law as a basis to set aside the Court's earlier decision. (Mot. p. 7, ln. 17-19). Although its  
9 true that *Taggart* is a significant case, the change in the law actually crafted a simpler  
10 standard for courts in the Ninth Circuit to hold creditors in contempt. Thus, there is no  
11 reason for the Court to set aside its earlier judgment under Rule 60(b)(5).

12 B) FRBP 60(b) (6) doesn't apply

13 PHH also tries using FRBP 60(b)(6) to set aside the Court's earlier ruling. This  
14 Rule allows a court to set aside a judgment for "any other reason that justifies relief."  
15 But relief under this rule is reserved for "extraordinary circumstances." *Ashford v.*  
16 *Steuart*, 657 F.2d 1053, 1055 (9<sup>th</sup> Cir. 1981). See also *Supermarket of Homes, Inc. V.*  
17 *San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1410 (9<sup>th</sup> Cir. 1986). Here, PHH's  
18 motion does not provide such an extraordinary circumstance.

19 3. PHH's motion is not timely

20 Although PHH argues it acted timely within one month of this Court reopening  
21 the case, it ignores the fact that it *could* have re-opened this case on its own at anytime  
22 after the Ninth Circuit's dismissal of its appeal back in February 2020. Instead, PHH  
23 waited for this Court to reopen this case, plus waited another month, a total of 8 months  
24 from the Ninth Circuit's ruling, to request its Rule 60 relief. That's not reasonable. See  
25 FRBP 9024, Rule 60(c). Thus, this Court can deny the Motion as untimely.

1 4. *Taggart* was not controlling

2 Ironically, the Ninth Circuit's *Taggart* decision was entered on April 23, 2018, two  
3 years *after* this Court decided the Motion for Contempt in this case. See *In re Taggart*  
4 888 F.3d 438 (9<sup>th</sup> Cir. 2018). Although the earlier BAP decision in *In re Taggart* 548  
5 B.R. 275 (B.A.P. 9<sup>TH</sup> Cir. 2016) came out in 2016 just months before this Court ruled on  
6 the Contempt Motion in this case, it was not binding on this Court. *Bank of Maui v.*  
7 *Estate Analysis, Inc.*, 904 F.2d 470, 472 (9<sup>th</sup> Cir. 1990). And critically, that decision  
8 would not have changed this Court's ruling. To start with, the Supreme Court *lowered*  
9 the Ninth Circuit's subjective standard the BAP used in *Taggart* to an objective one.  
10 Thus, the Supreme Court made it easier for this Court to confirm its earlier decision.

11 III

12 CONCLUSION

13 PHH's Motion for relief from judgment should be denied. There are no grounds  
14 for it. This Court does not have to consider *Taggart* retroactively. Besides, even if it did,  
15 the Court's decision would not have changed. Finally, PHH's request for a new  
16 evidentiary hearing should also be denied as it has no basis in fact or law.

17  
18 DATED this 5<sup>th</sup> day of February 2021.

19  
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